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81-2157

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CAROLINA CASUALTY INSURANCE COMPANY,
Petitioner,

versus

TRANSPORT INDEMNITY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stephen E. Darling
SINKLER GIBBS & SIMONS
160 East Bay Street
Post Office Box 340
Charleston, South Carolina 29402
(803) 722-3366
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

(I) Do the applicable provisions of the Interstate Commerce Act and of the Interstate Commerce Commission rules and regulations require that an I.C.C. certificated lessee of a tractor/trailer vehicle being used in interstate commerce and/or its insurance carrier provide primary protection or insurance coverage to the vehicle, owner, operator and lessee of said vehicles involved in a motor vehicle accident as to the traveling public?

PARTIES

Petitioner Carolina Casualty Insurance Company was the Defendant in the District Court and the Appellant in the Court of Appeals. Respondent Transport Indemnity Company was the Defendant in the District Court and the Appellee in the Court of Appeals. Transport Indemnity Company is a subsidiary of Transport Underwriters Association, a publicly owned corporation. There have been, and are, no other parties to the case.

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REPORTS OF OPINIONS

The Order of the District Court and the Opinion of the Court of Appeals have not been reported. The complete texts of these Opinions are set forth in the Appendix to this Petition.

JURISDICTION

The Opinion of the Court of Appeals was decided and entered on February 24, 1982. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Section 1254(1).

STATUTES & REGULATIONS INVOLVED

49 U.S.C.A. Section 304 (e) provides as follows:

REGULATIONS GOVERNING USE OF VEHICLES OWNED BY OTHERS

(e) Subject to the provisions of subsection (f) of this section, [setting forth exceptions not here relevant] the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property -

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

Repealed. Pub. L. 95-473, Section 4(b), Oct. 17, 1978, 92 Stat. 1466; substituted provision codified at 49 U.S.C.A. Section 11107.

49 U.S.C.A. Section 315 reads as follows:

SECURITY FOR PROTECTION OF PUBLIC

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The Commission may in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belong *(sic.)* to shippers and/or consignees and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to

compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid. The Commission may prescribe, with respect to motor carriers operating within the United States in the course of engaging in transportation between places in a foreign country or between a place in one foreign country and a place in another foreign country, such reasonable regulations concerning security for the protection of the public as the Commission is authorized, by this section, to prescribe for other motor carriers.

Repealed. Pub. L. 95-473, Section 4(b), Oct. 17, 1978, 92 Stat. 1466; substituted provision codified at 49 U.S.C.A. Section 10927.

49 C.F.R. Section 1043.1 states in pertinent part as follows:

... no common or contract carrier subject to Part II of the Interstate Commerce Act shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such carrier or remain in force unless and until they shall have been filed with and accepted by the Commission. A surety bond, certificate of insurance, proof of qualifications as a self-insurer, or other securities or agreements, in the amounts prescribed in Section 1043.2, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries or the death of any person resulting form the negligent operation, maintenance, or use of motor vehicles in transportation subject to Part II, Interstate

> Commerce Act, or for the loss of or damage to property of others.

Finally, Section 49 C.F.R. Section 1057.4(a)(4) provides in pertinent part as follows:

> (a) *Contract requirements.* The contract lease, or other arrangement for the use of such equipment:
>
> (4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement.
>
> This provision was modified in some respects; 44 F.R. 4681, Jan. 23, 1979; *compare* 49 C.F.R. Section 1057.12(d)(1981).

STATEMENT OF THE CASE

Carolina Casualty Insurance Company (Carolina) instituted this action for declaratory judgment pursuant to the Declaratory Judgments Act, 28 U.S.C.A. Section 2201 *et seq.*, seeking declaratory relief and monetary damages. This claim arises out of a dispute between two insurance companies, Carolina and Transport Indemnity Company (Transport), as to the nature and extent of their respective coverages available to a leased tractor/trailer rig, its owner, operator, and lessee. Transport interposed an Answer and Counterclaim and thereafter the matter was presented to the District Court under a Stipulated Statement of Facts and separate Proposed Findings of Fact and Conclusions of Law. Jurisdiction of the District Court was established under 28 U.S.C.A. Section 1332.

A motor vehicle accident occurred on August 20, 1977, on U.S. Highway 78 in or near Summerville, South Carolina, when a tractor/trailer driven by John Driggers rear-ended a 1977 Ford pickup truck and then collided with a 1976 Chevrolet as the two passenger vehicles were stopped at a traffic light. The cause of the accident was the negligence of Driggers. Driggers was operating a 1974 Kenworth tractor, pulling a 1974 American trailer.

The Kenworth tractor and American trailer, together hereinafter referred to as the "truck",were owned by Richard P. McElmurray who had hired and was the regular employer of Driggers. On the date of the accident, the truck and its driver were leased to Refrigerated Transport Company, Inc. (Refrigerated) pursuant to a trip lease. The trip lease did not contain any indemnification agreement applicable to the facts of this case.

Carolina issued to McElmurray its Combination Automobile Policy number AC 18 20 00 and Transport issued its Occupational Comprehensive Liability and Comprehensive Physical Damage Policy number 4003150 and an umbrella policy number 4003150-X to Refrigerated. All of these policies were in full force and effect at the time of the subject accident.

As a result of the accident, numerous claims and two law suits brought against Earl Myers, Jr. (in one law suit), John Mosley Driggers and Richard P. McElmurray were instituted. The claims and law suits were settled under a complete reservation of rights between the two parties, Carolina and Transport, to claim indemnity, each from the other. All settlements were reasonable and under a complete reservation of rights by both parties. Ultimately, Carolina paid claims totalling $12,264.17 and incurred $1,918.00 in attorney's fees, costs and dis-

bursements resulting therefrom. Transport paid claims totalling $3,110.81 and incurred adjustment expenses of $1,078.17.

At the time of the accident giving rise to this case, Richard P. McElmurray had made the filing required by the South Carolina Public Service Commission and Carolina's policy was appropriately endorsed to reflect that fact. The truck involved was operating under the Interstate Commerce Commission (I.C.C.) authority granted to Refrigerated (Transport's named insured) and the Transport policies were appropriately endorsed to reflect that fact. At the time of the accident, Refrigerated had supervision and control over the truck and its driver, Driggers. Transport's policy had no omnibus clause providing for coverage to anyone other than the named insured.

Carolina contended that because of the I.C.C. statutes and rules and regulations Refrigerated and its insured, Transport, provided primary coverage to protect the public against the negligence of Refrigerated, McElmurray and Driggers. Transport asserted that it provided coverage only for Refrigerated and that, in any event, its coverage would be secondary as to that of Carolina but as to Refrigerated only.

The District Court found that unless there were a provision of law which required insurance protection to be extended to the driver Driggers by Transport, Transport provided Driggers no coverage since he was not a named insured under its policy. The Court then went on to find that no provision of law required that Driggers be covered by Transport and that the I.C.C. certificated motor carrier answer to the public and not to owners, lessors, or their employees, or their insurance carriers.

The Court held as a matter of law that Transport has no coverage for the accident in question since its insured, Refrigerated, was not sued. Further, the Court found in order to avoid circuity of action that Carolina's policy should be held primary. Based upon its findings, the District Court awarded Transport $4,188.98 against the Plaintiff on Transport's Counterclaim. The Court of Appeals, in a *per curiam* decision, affirmed the Order of the lower court for the reasons advanced by the District Court in its Opinion.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in conflict with the decisions of other Federal Courts of Appeals on the same matter and decides a federal question in a way in conflict with a State Court of last resort.

A number of cases have addressed the issue of the impact of I.C.C. statutes and rules and regulations upon coverage disputes between insurers of truck lessees and lessors. One line of cases relied upon by Carolina holds that insurers of truck lessees are primarily liable as a matter of public policy and law. *Hagans v. Glens Falls Insurance Company*, 465 F.2d 1249 (10th Cir. 1972); *Argonaut Insurance Company v. National Indemnity Company*, 435 F.2d 718 (10th Cir. 1971); *Allstate Insurance Company v. Federal Insurance Company*, 23 Md.App. 105, 326 A.2d 29 (1974) modified on other grounds 341 A.2d 399 (1975); *Weeks v. Kelley*, 377 A.2d 444 (Me. 1977).

Another line of cases urged by Transport is in direct conflict and reaches the opposite result. *Carolina Casualty Insurance Company v. The Insurance*

Company of North America, 595 F.2d 128 (3d Cir. 1979); *Carolina Casualty Insurance Company v. Underwriters Insurance Company*, 569 F.2d 304 (5th Cir. 1978); *National Mutual Insurance Company v. Liberty Mutual Insurance Company*, 196 F.2d 597 (D.C. Cir. 1952); *Transport Indemnity Company v. Teter*, 575 S.W.2d 780 (Mo. 1978); *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974). These two lines of cases reach opposite and irreconcilable conclusions on the question of whether a truck lessee's coverage is always primary as a matter of law by virtue of the Interstate Commerce Act and applicable rules and regulations. The decision of the Fourth Circuit in the instant case aligns itself with those decisions from the Third, Fifth, Eighth and D.C. Circuits, as well as the Missouri Court. Carolina submits that the holdings from the Tenth Circuit, the State of Maryland and the State of Maine are more correctly decided.

In *Hagans, supra*, the United States Court of Appeals for the Tenth Circuit held that the I.C.C. certificated carrier's insurer was the primary insurer and could not avoid its responsibility by relying upon the terms and the provisions contained in a collateral lease agreement between the motor carrier and the lessor. Citing the *Argonaut* decision, the Court held that the I.C.C. endorsement, although not expressly referring to other insurance provisions, said that no condition, provision, stipulation or limitation of the policy shall relieve the company (the lessee's insurer) from liability and that the I.C.C. endorsement imposed primary liability. The teaching of *Argonaut* was that the lessee's insurer is the primary insurer as a matter of law such holding obviously being grounded upon public policy.

In *Argonaut v. National Indemnity Company, supra*, the Tenth Circuit held that an I.C.C. endorsement on a

lessee's policy had the effect of making the lessee's company the primary insurer. The I.C.C. endorsement imposed primary liability and eliminated any need for consideration of the effect of identical other insurance clauses.

In the *Weeks* case, the Supreme Judicial Court of Maine held that the regulations of the I.C.C. in a lease agreement that unequivocally mandated that the lessee's insurer assume full responsibility for the operation of the leased equipment operated to require the lessee to bear the financial consequences of any negligence in the operation of the leased equipment while being used in the lessee's business. In the absence of any indemnification agreement in the lease providing otherwise, the lessee's insurer remained contractually as well as statutorily responsible for the injuries sustained by the travelling public as a result of the negligent operation of the equipment. The Court noted that I.C.C. regulations had the full force and effect of law. The Court pointed out that the applicable regulation, 49 C.F.R. Section 1057.4 [now Section 1057.12(d)] mandated that a trip lease be in writing and provide for the exclusive possession, control and use of the equipment and for the complete assumption of responsibility in respect thereto by the lessee. The Court held that the lessee's liability was not premised on traditional concepts of master-servant or employer-employee relationships but, rather, liability arose by virtue of the I.C.C. regulations which were given their plain and ordinary meaning obligating the lessee to assume complete responsibility in respect to the leased equipment.

The cases cited above, upon which Transport relies, generally hold that an I.C.C. endorsement does not relieve the lessor's carrier of responsibility to pay claims

against its insured. However, Carolina submits that this argument ignores the purpose of the I.C.C. rules and regulations and that Interstate Commerce Act to protect the public against the negligent acts of vehicles operated in interstate commerce. If Transport's position is accepted, there are numerous situations in which the travelling public would be left unprotected. Such situations arise if the owner and driver have no insurance; if the owner's and/or driver's insurance has been cancelled for some reason; if the owner's and/or driver's insurance has lapsed; if the owner and driver had no insurance and were not financially able to satisfy a judgment; and/or if the owner and/or driver's insurer had some policy defense such as noncooperation, failure to report the claim, etc.... Thus, the I.C.C. rules and regulations, with their overriding policy of protecting the public, create a certain and set primary insurer, *i.e.* the lessee's insurance company, to provide protection in all cases to the public in accidents in which the negligence of an I.C.C. certificated lessee driver causes and accident.

Carolina additionally submits that the Fourth Circuit Court of Appeals decided an important question of federal law which has not been but should be settled by this Court. The cases earlier cited demonstrate the conflicts among the Federal Courts of Appeals and State Courts concerning the issue involved in this case. The issue presented is one of federal law controlled by the interpretation of the Interstate Commerce Act and Interstate Commerce Commission rules and regulations. 49 U.S.C.A. Section 315, a part of the Interstate Commerce Act, concerns security for the protection of the public and provides generally that an I.C.C. certificated motor carrier shall comply with the rules and regulations of the Interstate Commerce Comission which shall

govern the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to, or the death of, any person resulting from the negligent operation, maintenance or use of the motor vehicle under such certificate or permit.

49 C.F.R. Section 1043.1(a), promulgated pursuant to the above statute, dictates that no I.C.C. certificated carrier shall engage in interstate or foreign commerce without such certificate of insurance, proof or qualification as a self-insurer or other securities or agreements conditioned to pay any final judgment recovered against such motor carrier for the negligent operation, maintenance or use of vehicles engaged in interstate transportation.

The Interstate Commerce Act at 49 U.S.C.A. Section 304(e)(2) requires that leased vehicles be under the complete control and responsibility of the I.C.C. certificated lessee and that such lessee will be fully responsible for the operation thereof in accordance with applicable laws and regulations as if it were the owner of such vehicle. Rules and regulations establish that a lease for the vehicle must provide that control and responsibility for operation of the equipment shall be that of the lessee during the period for which the vehicle and driver are leased. 49 C.F.R. Section 1057.12(d) [formerly Section 1057.4].

The driver of said vehicle is treated as a statutory employee of the lessee for whom the franchised or certificated motor carrier lessee becomes responsible when the driver is engaged in activities of the motor carrier. *Transamerican Freight Lines, Inc. v. Brada Miller Freight*

Systems, Inc., 423 U.S. 28, 96 S.CT. 229, 46 L.Ed. 2d 169 (1975); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969) *cert.* denied, 395 U.S. 9, 89 S.Ct. 1999, 35 L.Ed. 2d 450 (1969); *Weeks v. Kelley, supra.*

The I.C.C. rules and regulations obviously require that insurance or some other form of security be provided by the lessee to protect the public when the truck and driver are under the full dominion, control and supervision of the lessee. Based upon the I.C.C. rules and regulations, and I.C.C. policy endorsements (Form BMC 90), Carolina submits that Transport cannot relieve itself from liability because the federal law and regulations require Transport to provide protection to the public.

This Honorable Court has not addressed the precise issue here involved; and the varying and conflicting effects given to the statutory, regulatory and contractual provisions at issue by the State and Federal Courts necessitate the intervention of this Court to determine the important question of federal law involved. The Petitioner submits that the vesting of exclusive possession, dominion and control of the lessor's equipment and the assumption of complete responsibility for the operation, maintenance and use of the equipment by Transport's insured, Refrigerated, requires Transport to provide primary protection to the public. The provisions of law cited in the Interstate Commerce Commission Act and I.C.C. regulations above mandate that Transport provide insurance coverage for McElmurray and Driggers as well as Refrigerated in relation to the accident giving rise to this case. See *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra.*

In order to encourage a uniform understanding of obligations of truck lessees and lessors to the public and

among themselves and to provide uniform and full protection to the public as well as resolving conflicts among the Courts of Appeals and State Courts, this Court should determine the issues presented by this case and find that the I.C.C. rules and regulations and Interstate Commerce Act require an I.C.C. truck lessee's insurer provide primary coverage to the leased truck, owner and driver of said motor vehicle.

CONCLUSION

For the foregoing reasons, the Petitioner urges that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

Stephen E. Darling
SINKLER GIBBS & SIMONS
160 East Bay Street
Post Office Box 340
Charleston, South Carolina 29402

Attorneys for Petitioner

APPENDIX

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APPENDIX A

No. 81-1782

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

CAROLINA CASUALTY INSURANCE COMPANY
Appellant,

v.

TRANSPORT INDEMNITY COMPANY,
Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. *Falcon B. Hawkins, District Judge.*

Argued February 4, 1982 Decided February 24, 1982

Before WINTER, Chief Judge, HALL, Circuit Judge, and MICHAEL,* District Judge.

Stephen E. Darling (Sinkler, Gibbs & Simons on brief) for Appellant; Wade H. Logan, III (Keating L. Simons, III, Holmes, Thomson, Logan & Cantrell on brief) for Appellee.

*Honorable James Harry Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

This action was instituted to determine the rights, duties and liabilities of two insurers with regard to one another arising out of a motor vehicle accident. Carolina Casualty Insurance Company (Carolina) is the insurer of a truck owner and persons operating the truck with his permission. Transport Indemnity Company (Transport) is the insurer of the holder of an I.C.C. certificate which leased the insured truck. The driver of the truck was the statutory employee of the lessee. While on a trip conducted under the authority of the lessee's I.C.C. certificate, he was involved in an accident either as a result of his negligence or under circumstances where both insurers agree that it was proper to settle the claims of third parties.

The district court decided that Carolina was the primary insurer and that Transport's policy afforded no protection to the driver. It further held that if Transport were required to pay on behalf of the lessee, it had the right to reimbursement from Carolina.

After consideration of the record, the briefs and oral argument, we affirm for the reasons advanced by the district court. Carolina Casualty Company v. Transport Indemnity Company, Civil Action No. 79-1962-1, D. S.C. (July 7, 1981).

AFFIRMED.

APPENDIX B

CIVIL ACTION NO. 79-1962-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

CAROLINA CASUALTY INSURANCE COMPANY,
Plaintiff,

vs.

TRANSPORT INDEMNITY COMPANY,
Defendant.

ORDER

FILED July 7, 1981
John W. Williams, Clerk, Charleston, S. C.
ENTERED 7-7-81

The parties to this action have agreed that the court should decide this case based on a Stipulated Statement of Facts filed June 24, 1980, and on proposed Conclusions of Law filed by the parties with the court. The court hereby adopts the said Stipulated Statement of Facts verbatim.

CONCLUSIONS OF LAW

I find, initially, that this action is properly before the court pursuant to Title 28, United States Code Section

2201, to determine various rights, duties and liabilities of the parties under the terms and provisions of two insurance policies, and that there is an actual controversy between the parties hereto.

I further find that all parties are properly within the juridiction of the court, as ia the subject matter of this action, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand and 00/100 (10,000.00) Dollars.

This case involves a coverage dispute between two insurance carriers who issued policies to a truck owner/lessor and his lessee. The carrier for the lessor, Carolina Casualty, and the carrier for the lessee, Transport Indemnity, have each alleged in their respective pleadings that they have no coverage, or, in the alternative, that any coverage afforded by them is excess over that of the other.

Basically, this court is asked to resolve three questions: (1) Does the Plaintiff, Carolina Casualty, afford coverage for the accident in question? (2) Does the Defendant, Transport Indemnity, also afford coverage for this accident? and (3) Whether either policy affords only excess coverage, vis-a-vis the other. Only if the first two questions are answered in the affirmative will it be necessary to address the third.

At this point, it is important to define the limited scope of this inquiry. I have been aided by the parties in this regard insofar as they have jointly prepared and filed a stipulated Statement of Facts. Among other things, the parties have agreed that, for the purposes of this action, John Driggers, the driver of the truck, was negligent and that his negligence was the proximate cause of all damages for which payments were made. Thus, Driggers

was the one primarily obligated to pay those damages with the lessor and lessee being liable derivatively, if at all. In my view, then, the initial coverage issues listed above boil down to whether Driggers was insured under one or more of the policies at issue. In light of the conclusions reached herein, it will not be necessary to address any coverage issues with respect to the parties who may be liable on a derivative basis.

Turning to the Carolina Casualty policy, there is no question but that it covered Driggers in this accident. Carolina Casualty specifically insured the tractor/trailer involved in the accident. It was a scheduled vehicle, having been listed on the Amendment of Escrow Premium Payment endorsement which was effective May 17,1977. Thus, the tractor/trailer was a defined automobile under Paragraph (a)(1) of Insuring Agreement IV. Driggers was driving the tractor/trailer with the express permission of the named insured, Richard McElmurray, and as such, came within the definition of "insured" in Paragraph (a) of Insuring Agreement III.

Therefore, pursuant to coverages A and B of Insuring Agreement I, Carolina Casualty had agreed to pay all sums which Driggers became legally obligated to pay for bodily injury and property damage arising out of the use of the defined automobile, the tractor/trailer. On this basis, I find that, with respect to the accident in question, Carolina Casualty afforded coverage to the vehicle, its owner and the driver, Driggers, the one whose negligence caused the accident.

Any coverage arguably extended by Transport Indemnity pursuant to its policy is quite different from that of Carolina Casualty. Refrigerated Transport, Inc., being the only named insured (except for several

corporate entities not here relevant) and there being no omnibus clause in the Transport Indemnity policy, the only clause which would bring the tortfeasor, Driggers, within the definition of insured is contained in Part 1, Section 2, the pertinent portions of which are as follows:

> The word "INSURED" shall mean, ..., any other person, firm or organization to whom insurance protection has been extended under the policy or made so by any provision of law.

There is no other express provision by way of endorsement or otherwise in the Transport Indemnity policy which includes Driggers within the definition of "insured." Thus, unless there is "any provision of law" which requires insurance protection to be extended to Driggers by Transport Indemnity under the circumstances of this case, Driggers is not an insured and Transport Indemnity has no coverage.

In the context of this case, it is clear that the operative provision has reference to the Interstate Commerce Act, codified as Title 49 of the United States Code, and the enabling act for the South Carolina Public Service Commission, Sec. 58-3-10 et seq., Code of Laws of South Carolina (1976). Also to be considered are the various regulations promulgated pursuant to each. The issue, then, with respect to any coverage afforded by Transport Indemnity, is whether those statutes or regulations require that Driggers be deemed to be an insured under the facts of this case.

The pertinent statutes and regulations on both the state and federal levels are substantially similar and, to the extent they are relevant here, each regulatory scheme contains two basic thrusts. One is directed towards ensuring that the certificated carrier obtains liability

insurance in an amount sufficient to adequately compensate third parties injured by reason of the operations of the certificated carrier. 49 U.S.C. Sec. 315; 49 C.F.R. Sec. 1043.1 (a); S.C. P.S.C. Rule 103-170.

The second major area of regulation relates to the leasing of trucks and trailers. The regulations provide that the lease agreement must contain provisions placing responsibility and control over the operation of the vehicle in the hands of the lessee. 49 C.F.R. Sec. 1057-2 (d); S.C. P.S.C. Rule 103-222 (1)(4). It is the combined effect of these regulatory schemes which has formed the basis of the position taken by insurance carriers for truck lessors to the effect that coverage afforded by the lessee's insurer is always primary.

Numerous cases have addressed the issue of the impact of I.C.C. and P.S.C. regulations on coverage disputes between insurers of truck lessees and lessors. In a number of cases and contexts arguments have been advanced that a lessee's coverage is primary as a matter of law by virtue of the control and responsibility regulations and/or the financial responsibility regulations. Such arguments have met with success in many cases, notably *Argonaut Insurance Company v. National Indemnity Company*, 435 F.2d 718 (10th Cir. 1971) and *Hagans v. Glens Falls Insurance Company*, 465 F.2d 1249 (10th Cir. 1972).

That line of cases is in direct conflict with a series of cases reaching the opposite result. See, e.g. *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128 (3rd Cir. 1979) and *Carolina Casualty Insurance Company v. Underwriters Insurance Company*, 569 F.2d 203 (5th Cir. 1978). These two cases held, in this connection, that I.C.C Regulations

are not dispositive in a coverage dispute between two insurance carriers. I note also that this view is in accord with an older case in the Third Circuit, *Allstate Insurance Company v. Liberty Mutual Insurance Company*, 368 F.2d 121 (3rd Cir. 1966).

With respect to the impact of the South Carolina Public Service Commission Regulations, the recent case of *American Interinsurance Exchange v. Commercial Union Assurance Company*, 605 F.2d 731 (4th Cir. 1979) is controlling. There the Court held that the P.S.C. Regulations "merely ensure that viable insurance will be available to innocent victims of automobile accidents. They in no way require that such insurance shall be primary over other available insurance." 605 F.2d at 736. Thus, my concern at this juncture is limited to the impact of the Interstate Commerce Act and I.C.C. Regulations promulgated pursuant thereto.

While there are no Fourth Circuit Court opinions directly addressing the same issue with respect to regulations promulgated by the Interstate Commerce Commission, I am convinced that the same result would be reached as that in *American Interinsurance Exchange, supra*. Both of the views briefly set forth above are purportedly based on the public policy underlying the Interstate Commerce Act and I.C.C. Regulations. Although there was no discussion in *Argonaut, supra*, as to the dictates of public policy in this respect, the Court in *Hagans, supra*, stated, once again without discussion, that the *Argonaut* decision was "obviously grounded on public policy." 465 F.2d at 1252. In contrast, the cases holding that the Interstate Commerce Act and I.C.C. Regulations do not make the lessee's coverage primary as a matter of law have undertaken a more thorough, and in by view more

persuasive, examination of the nature of the public policy involved.

By way of example, the Court in *Carolina Casualty Insurance Company v. Insurance Company of North America, supra*, looked for guidance to the U.S. Supreme Court opinion in *American Trucking Association v. United States*, 344 U.S. 298, 73 S.Ct 307, 97 L.Ed. 337 (1953). In that case the Supreme Court had identified a number of abuses to which the regulations were directed, including sharing of authority, evasion of safety requirements, and evasion of financial responsibility to the public. The Third Circuit Court went on to note that the lessee's carrier "could not absolve itself of a duty to make the initial payment of compensation to an injured member of the public, in the event that neither... party involved could answer financially for the damage." 595 F.2d at 137. Especially pertinent here is the holding in that case that:

> While a lessee cannot free itself of federally imposed duties when protection of the public is at stake, the federal requirements are not so radically intrusive as to absolve lessors or their insurers of otherwise existing obligations under applicable state tort law doctrines or under contracts allocating financial risks among private parties. 595 F.2d at 138.

In another recent case, *Carolina Casualty Insurance Company v. The Underwriters Insurance Company*, 569 F.2d 305 (5th Cir. 1978) the Fifth Circuit employed reasoning similar to that just expressed. There the Court held:

> ... the endorsement does not make (the insurer of the licensed carrier) the primary insurer as a

> matter of law... I.C.C. policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but those factors cannot be invoked by another insurance company which contracted to insure a specific risk and which needs no equivalent protection. 569 F.2d 313.

That approach is particularly appropriate here in that Carolina Casualty has issued a policy specifically insuring the vehicle and its owner, and, through its omnibus clause, the negligent driver. Having contracted to insure the precise risk which occurred, and charged and collected a premium therefor, Carolina Casualty should not be permitted to absolve itself of its obligations to those whom it specifically insured.

In choosing between two apparently irreconcilable lines of cases, I am impressed with the evident effect on the law in this area of the decision of the United States Supreme Court in *Trans American Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*,423 U.S. 28, 46 L.Ed. 2d 169, 96 S.Ct.229 (1975). The holding there, albeit narrow by its own terms, was that an indemnification agreement contained in the lease which placed responsibility on the lessor for payments to injured third parties did not violate the public policy underlying the Interstate Commerce Act and I.C.C. Regulations. The Court noted that with respect to the responsibility and control regulations, the I.C.C. was concerned with that "control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission." 423 U.S. at 39, 46 L.Ed. 2d at 178. There is, of course, no similar concern expressed regarding the protection of insurance carriers for truck lessors. Implicit in this approach is the proposition that once the public is protected by the

existence of an adequate fund, the purpose of the regulations is fulfilled and the parties and their insurers are free to allocate ultimate responsibility among themselves.

Considering the foregoing authorities, I am convinced that the public policy of protecting innocent third parties from financially irresponsible truckers does not require that the insurer for an I.C.C. certificated carrier be primarily liable as a matter of law in a case where ample coverage is available through the insurer of the owner of the vehicle. I am also persuaded that if and when the Fourth Circuit Court of Appeals addresses the issue it will reach a result consistent with *American Interinsurance Exchange, supra*, and hold that I.C.C. Regulations do not make the lessee's coverage primary.

American Interinsurance Exchange, supra, specifically holds that the South Carolina Public Service Regulations requiring the lessee of a truck to obtain liability insurance in his name, do not operate to make that insurance primary as a matter of law. There being no basic distinction between the South Carolina Public Service Commission Regulations and those of the I.C.C., I find that the I.C.C. Regulations likewise do not require that a lessee's insurance shall be primary over other available insurance.

The determination that neither P.S.C. nor I.C.C. regulations make a lessee's coverage primary as a matter of law does not, in and of itself, resolve the threshold issue of whether the regulations effectively bring Driggers within the definition of an insured in the Transport Indemnity policy. An examination of the language of those regulations, read in conjunction with the public policy considerations outlined above, convinces me that Driggers is not an insured under the Transport Indemnity policy.

The provisions of law requiring that a carrier obtain and file proof of liability insurance include P.S.C. Rule 103-170, 49 U.S.C. Sec. 315, and 49 C.F.R. Sec. 1043.1. All of these are couched in substantially similar terms and require insurance "conditioned to pay any final judgment recovered against such motor carrier." (Quoted portion is from 49 C.F.R. Sec. 1043.1(a)).

Nowhere is there any requirement that the driver, or the owner for that matter, be an insured within the policy, only that if a judgment is recovered against the I.C.C. certificated carrier that there will be funds available to pay it. It is true that the driver will be deemed to be a statutory employee of the I.C.C. carrier and that the carrier may be held liable for the driver's negligence under settled principles of respondeat superior. *Mellon National Bank & Trust Company v. Sophie Lines, Inc.*, 289 F.2d 473 (3rd Cir. 1961); *Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953). Such a rule, however, does not require that the driver, or his employer in fact, the owner/lessor, be insured as to their personal liability. This view is entirely consistent with public policy considerations. Had a judgment been recovered against Refrigerated Transport, the motor carrier referred to in 49 C.F.R. Sec. 1043.1(a), there is no doubt that Transport Indemnity could not have avoided liability. But that is not the case here. In fact, the I.C.C. carrier in this case was not even named a Defendant in any of the litigation following the accident.

In resolving the issue as to whether "any provision of law" requires that Driggers be brought within the definition of an insured in the Transport Indemnity policy, I have found the reasoning set forth in *Transport Indemrity v. Teter*, 575 S.W. 2d 780 (Mo. 1978) to be most persuasive. The issue there was virtually identical to that

here, i.e., whether the insurer for the I.C.C. certificated carrier/lessee owed coverage and a duty to defend the driver, an employee of the owner/lessor. There, as here, the driver, but not the I.C.C. carrier, was the Defendant against whom claims were asserted. In that case, the driver argued that the combined effect of the I.C.C. Regulations as to control and responsibility and financial responsibility was to make him an insured within the policy.

In rejecting that argument, the Court pointed to the language of the endorsement as to te insurer's agreeing to pay "any final judgment recovered against the insured" and noted that "insured", within the meaning of that endorsement referred to the certificated carrier. 575 S.W. 2d at 785. Such a result does not detract from the goal of protecting the public because "that purpose is fully served by a policy of insurance which insures the *carrier* against claims of negligent injury or death from its motor vehicle operations. (Citation omitted). The coverage of the driver is extraneous to this essential purpose." 575 S.W. 2d at 786 (Emphasis in original). This view is in line with that adopted in *Kansas City Fire and Marine Insurance Co. v. Hartford Insurance Group*, 368 N.Y.S. 2d 791, 82 Misc. 2d 109, a case which is similar in principal but involving New York Public Service Commission regulations. There, the Court held that the P.S.C. endorsement to the lessee's policy provided coverage for any liability of the lessee, but did not require that the lessee's insurer provide a defense and coverage to the owner/lessor of the vehicle, or to the driver, an employee of the lessor.

In conclusion, with respect to the "any provision of law" definition of an insured employed in the Transport Indemnity policy, I find as a matter of law that the

pertinent provisions of law direct only that the I.C.C. certificated carrier answer to the public, not to owner/lessors, or to their employees, or their insurance carrier. Since there is no other policy provision that would extend coverage to Driggers, I find as a matter of law that Transport Indemnity has no coverage for the accident in question.

I further find, as a matter of law, that in order to avoid circuity of action, Carolina Casualty's policy should be held to be primary. It is apparent that if Refrigerated Transport, the insured of Transport Indemnity, had to pay these damages, which were incurred solely because of the acts or omissions of Mr. Driggers, then it would be entitled to indemnity from Mr. Driggers. It is undisputed that one held derivatively liable has a right of action over against his employee, where the on derivatively liable has been made liable to a third party by reason of the employee's negligence. *Jenkins vs. Southern Railway Company*, 130 S.C. 180, 125 S.E. 912; 73 AmJur 2d, Subrogation, Sec. 39, Page 623.

Transport's right of indemnity against Driggers would necessarily include a right against Carolina Casualty. The general rule is that Carolina Casualty is liable to protect its insured, Driggers, from any loss by reason of his obligation to indemnify a co-tortfeasor. See, generally, Annotation, 4 ALR 3rd 620.

In other words, if Refrigerated Transport should be found liable, it would have the right to proceed by indemnification against Driggers. As Refrigerated's subrogee, Transport could then sue Driggers, a permissive user under Carolina Casualty's policy, ultimately recovering against Carolina. As stated above, to avoid circuity of action, I hold that Carolina Casualty's policy is primary. Now, therefore, it is

ORDERED, ADJUDGED AND DECREED that the Defendant shall have judgment against the Plaintiff in the amount of Four Thousand One Hundred Eighty-Eight and 98/100 ($4, 188.98) Dollars, representing the amount paid be Defendant in settlement of various claims plus its adjustment expenses; and it is

FURTHER, ORDERED, ADJUDGED AND DECREED that the Defendant shall have judgment against the Plaintiff for its costs and disbursements in this action; and it is

FURTHER, ORDERED, ADJUDGED AND DECREED that the claim of the plaintiff be dismissed.

AND IT IS SO ORDERED.

s/ Falcon B. Hawkins
United States District Judge

Charleston, S. C.
July 7, 1981.

TRUE COPY
Test:
John W. Williams, Clerk
s/ M. Pipes
By: Deputy Clerk

APPENDIX C

No. 81-1782
C/A 79-1962-1

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

CAROLINA CASUALTY INSURANCE COMPANY
Appellant,

v.

TRANSPORT INDEMNITY COMPANY,
Appellee.

JUDGMENT

FILED March 22, 1982
John W. Williams, Clerk, Columbia, S. C.

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby AFFIRMED.

FILED February 24, 1982

U.S. Court of Appeals, Fourth Circuit

s/ William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk
By: E. Belton, *Deputy Clerk*

COSTS - APPELLANT

Costs of printing appellee's brief	$124.00
Total Costs	$124.00

APPENDIX D

CIVIL ACTION FILE NO. 79-1962-1

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CAROLINA CASUALTY INSURANCE COMPANY
Appellant,

v.

TRANSPORT INDEMNITY COMPANY,
Appellee.

JUDGMENT

FILED July 7, 1982
John W. Williams, Clerk, Charleston S.C.

ENTERED 7-7-81

This action came on for (hearing) before the Court, Honorable Falcon B. Hawkins , United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that defendant, Transport Indemnity Company, recover of plaintiff, Carolina Casualty Insurance Company, the sum of Four Thousand One Hundred Eighty-Eight and 98/100 ($4,188.98) Dollars, representing the amount paid by

defendant in settlement of various claims plus its adjustment expenses and costs and disbursements in this action;

IT IS FURTHER ORDERED AND ADJUDGED that the claim of the plaintiff be dismissed.

Dated at Charleston, South Carolina, this 7th day of July, 1981.

John W. Williams
Clerk of Court

By: M. Pipes
Deputy Clerk